

INSIGHTS

Electricity Buy/Sells: Permitted, Prohibited, or Simultaneous Exchanges?

May 29, 2012

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Recently the Federal Energy Regulatory Commission [clarified the regulatory status](#) of a type of energy transaction called a "Simultaneous Exchange."¹ However, at the same time, the Commission has created ambiguity in a related area. That is, whether electricity Buy/Sell transactions are prohibited by the Commission's orders and regulations. Previously, market participants have understood the answer to be "no."² Statements by the Commission in this order give rise to questions about how the Commission views such transactions and, given the definition of Simultaneous Exchanges established by FERC, whether Buy/Sells are a subset thereof. **Background** In June 2010, Puget Sound Energy, Inc. filed a petition requesting that the Commission confirm that "locational exchanges"³ of electric power, a kind of off-setting power sale, are permissible wholesale power transactions and not transmission transactions subject to an Open Access Transmission Tariff (Puget Petition). Puget described such exchanges as: a pair of simultaneously arranged wholesale power transactions between the same counterparties in which party A sells electricity to party B at one location, and party B sells the same volume of electricity to party A at a different location with the same delivery period, but not necessarily at the same price.

Or in the alternative:

Locational exchanges performed (a) to bypass a constraint on a transmission system or to reduce risks of transmission curtailment, or (b) to trade around locational power market price spreads, do not constitute transmission transactions that must be conducted under authority of an OATT, but rather are wholesale power sales transactions.

The Commission's responsive order created a new definition of "Simultaneous Exchanges"⁴ and addressed how such exchanges should be treated from a regulatory perspective. *Puget Sound Energy, Inc.*, 138 FERC ¶ 61,121 (2012) (Puget Order) The Commission rejected both of Puget's proposed definitions of locational exchanges, and instead adopted the following description of what the Commission called "Simultaneous Exchanges"⁵:

Simultaneous exchanges occur when a pair of simultaneously arranged (i.e., part of the same negotiations) wholesale power transactions between the same counterparties in which party A sells an electricity product to party B at one location and party B sells a similar electricity product to party A at a different location have an overlapping delivery period. The simultaneous exchange is the overlapping portion (both in volume and delivery period) of these wholesale power transactions.

In adopting this definition, FERC focused on the "overlapping delivery period" concept and made no mention of any pricing differential issue. Applying that definition of Simultaneous Exchanges, the Commission ruled that the marketing function of a transmission provider cannot conduct Simultaneous Exchanges involving its affiliated transmission provider system "absent prior Commission authorization as evaluated on a case-by-case basis." Beyond that limitation, Simultaneous Exchanges were found acceptable. The Commission acknowledged that the basis for the Simultaneous Exchange prohibition "may not have been sufficiently clear from previous orders," and will therefore not impose the prior authorization "obligation upon simultaneous exchanges that are or have been effective prior to the date" of the Puget Order. Further, in its analysis, the Commission noted its "concern regarding simultaneous exchanges is that certain of these transactions may resemble transmission service because they involve a party placing power onto the power grid at one delivery point and then simultaneously receiving power at another delivery point."

The Puget Order Creates Ambiguity While the Puget Order may have brought some clarity to questions surrounding Simultaneous Exchanges, it injected ambiguity into what had appeared to be a previously settled area of FERC policy. That is, in its characterization of Puget's position, the Commission implied that electricity Buy/Sell transactions "as opposed to exchanges" are prohibited by FERC Order No. 888. In contrast to Simultaneous Exchanges, FERC characterized Buy/Sell transactions as those in which (1) Party A sells power to Party B at Point X; (2) Party B delivers that power to Point Y using its own transmission rights; and (3) Party B sells the power back to Party A at Point Y.

The Commission stated that "Puget stipulate[d] that such buy-sell transactions, where one party is simply substituted for the other party as shipper, are prohibited by the Commission pursuant to Order No. 888." Importantly, notwithstanding the Commission's statement, Puget's Petition does not contain any such stipulation, though it does distinguish Order No. 888's discussion of Buy/Sell transactions from locational exchanges. Based on the Commission's apparent endorsement of Puget's "stipulation," questions arise as to whether Buy/Sell transactions, as they are described in the Puget Order and as they have been conducted in the marketplace, are prohibited. If the Commission has indeed made this ruling, it would be contrary to the current understanding of Order No. 888 and practice in the electricity marketplace. Finally, it is unclear whether Buy/Sell transactions differ from Simultaneous Exchanges as defined by the Commission. We have found no FERC precedent establishing a prohibition on electricity Buy/Sell transactions. The Puget Order distinguishes two prior decisions regarding locational exchanges, but neither discusses Buy/Sell transactions. We have found no case in which an electricity market participant has been sanctioned for engaging in a Buy/Sell transaction, unlike such sanctions in the natural gas market. Order No. 888 contains only a limited reference to electricity Buy/Sell transactions, but in no way prohibits them. The Commission's discussion of Buy/Sell transactions in Order No. 888 is in the context of distinguishing between FERC-jurisdictional retail transmission in interstate commerce by public utilities and non-jurisdictional local distribution. In a paragraph from Order No. 888 quoted in the Puget Petition, the Commission expressed concern that retail Buy/Sell transactions could be used to "circumvent Commission regulation of *transmission in interstate commerce*." The Commission therefore affirmed its jurisdiction over the "interstate transmission component of transactions in which an end user arranges for the purchase of generation from a third-party."

The Commission then determined that it would address such retail transactions on a case-by-case basis. Beyond this reference to retail issues, Order No. 888 does not otherwise address Buy/Sell transactions or circumscribe their acceptability. Order No 888 was issued well after it was clear that Buy/Sell transactions were prohibited in the context of firm pipeline transportation. A prohibition against Buy/Sell transactions would also be inconsistent with market practice in which parties undertake typically very short-term Buy/Sell transactions. If such transactions are indeed prohibited, the Commission should clearly communicate that fact.

Where Do Electric Buy/Sells Stand? Finally, and most importantly, given the definition that the Commission has created for Simultaneous Exchanges, how do they differ from Buy/Sell transactions? Given the broad language of the definition of Simultaneous Exchanges in the Puget Order, a Buy/Sell appears to be a subset of a Simultaneous Exchange. In a Buy/Sell, the parties negotiate and transact a "pair of simultaneously arranged (i.e., part of the same negotiations) wholesale power transactions between the same counterparties in which party A sells an electricity product to party B at one location and party B sells a similar electricity product to party A at a different location" during an identical delivery period. These transactions are not necessarily at the same price, and, as described above, Party B uses its own transmission rights to deliver that energy back to A at the delivery point. Thus, is it the Commission policy that Buy/Sell transactions are (1) legitimate and unaffected; (2) prohibited; or (3) Simultaneous Exchanges subject to the limitations in the Puget Order? Given today's FERC enforcement environment, if the Commission has the answer to the question posed above, it should make it explicit to assist market participants in assuring their activities are compliant with FERC expectations.